UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

THE PHOENIX INSURANCE CO. and PDS ENGINEERING AND CONSTRUCTION, INC.	:	
v.	:	C.A. No. 16-223S
THE CINCINNATI INDEMNITY CO.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before me for a report and recommended disposition (28 U.S.C. § 636(b)(1)(B)) is Defendant's Motion to Dismiss this action pursuant to Rules 12(b)(2) and (3), Fed. R. Civ. Proc. (Document No. 7). Plaintiffs oppose the Motion.[1] (Document No. 15). A hearing was held on January 24, 2017. For the following reasons, I recommend that Defendant's Motion be GRANTED in part and that this matter be transferred to the Eastern District of Michigan pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

I. Background

Defendant ("Cincinnati") is an Ohio-based insurer. It argues that this Court does not have personal jurisdiction over it and that, in any event, "this matter revolves around the interpretation of an insurance policy issued by an Ohio Corporation to a Michigan entity [and thus]...it would be most effective for...a Michigan insurance policy to be interpreted in Michigan." (Document No. 8 at p. 17). Accordingly, Cincinnati consents to transfer of this case to the Eastern District of

[1] Plaintiffs were granted leave to conduct jurisdictional discovery on September 28, 2016 and filed their opposition after conducting such discovery.

Michigan as an alternative to dismissal under Rules 12(b)(2) or (3), Fed. R. Civ. Proc. Id. Plaintiffs ("Phoenix" and "PDS") object and argue that the facts and circumstances support this Court's assertion of personal jurisdiction over Cincinnati. Plaintiffs point, inter alia, to Cincinnati's business presence in Rhode Island as a licensed seller of insurance and the fact that this dispute arises out of the death of an employee of Cincinnati's insured, International Door, while working on a project in Rhode Island.

The following facts are gleaned from Plaintiffs' Complaint. Plaintiff Phoenix is the insurer of Plaintiff PDS. PDS, a Connecticut construction firm, contracted in late 2012 to do some work for Electric Boat ("EB"), a Connecticut corporation, at EB's Rhode Island facility. The PDS/EB contract required PDS to maintain certain liability insurance and to require its subcontractors to do the same and to include EB as an additional insured. PDS subsequently entered into a subcontract with International Door, Defendant Cincinnati's insured, on January 22, 2013. The subcontract related to the EB project and required International Door to maintain certain liability insurance and to include PDS and EB as additional insureds. Cincinnati issued a liability policy to International Door effective from March 1, 2013 to March 1, 2014. On July 15, 2013, Robert Depew sustained fatal injuries during the course of his duties as an employee of International Door and while working in Rhode Island on the EB project under the PDS subcontract. In 2015, Mr. Depew's widow instituted a wrongful death action in Rhode Island Superior Court against EB, PDS and others. EB and PDS tendered the defense and indemnity of the matter to Cincinnati claiming coverage as additional insureds under the International Door policy. Cincinnati denied coverage and PDS, and its insurer Phoenix, subsequently commenced this declaratory judgment action.

Cincinnati has been licensed (per R.I. Gen. Laws § 27-2-11) to transact insurance business in Rhode Island since 2008. (Document No. 15-2). As required by R.I. Gen. Laws § 27-2-13, Cincinnati designated Rhode Island's Superintendent of Insurance as its agent for receipt of service of process in Rhode Island. (Document No. 15-5 at p. 3). Cincinnati has no physical presence in Rhode Island. (Document No. 8 at p. 25). By Affidavit, Cincinnati represented in support of its Motion that it "does not write any commercial multiple peril or other liability policies in Rhode Island." Id. However, Plaintiffs assert that jurisdictional discovery has revealed that Cincinnati has "written and received premiums in Rhode Island, from 2010-2015." (Document No. 15 at p. 3 and No. 15-8). Cincinnati does not dispute this business activity but describes it as a "tiny" or "de minimis" fraction of its overall business.[2] (Document No. 16 at p. 5). Further, Cincinnati maintains that it did not write any commercial liability policies in Rhode Island but concedes that it "has issued a limited number of workers' compensation policies for insureds primarily located outside of Rhode Island that may have employees in Rhode Island." Id. at p. 4.

II. Standard of Review

It is well established that the burden rests with the plaintiff to make a prima facie showing to withstand a challenge to personal jurisdiction. Barrett v. Lombardi, 239 F.3d 23, 26 (1st Cir. 2001) (citing Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 83-84 (1st Cir. 1997)). See also, Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 50 (1st Cir. 2002). In assessing the plaintiff's prima facie case, the Court must accept as true the "plaintiff's (properly documented) evidentiary proffers" and construe them "in the light most congenial to plaintiff's

[2] Cincinnati presents uncontroverted evidence in the form of the Affidavit of Mark Welsh, its Regulatory Vice President, and attached business records (Document No. 16-1) that the total Rhode Island premiums in the relevant years represent only a small fraction of 1% of its total United States premiums.

jurisdictional claim." See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34, 51 (1st Cir. 1998). See also Trio Realty, Inc. v. Eldorado Homes, Inc., 350 F. Supp. 2d 322, 325 (D.P.R. 2004) (citing Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994)) (the court "draw[s] the facts from the pleadings and the parties' supplementary filings, including affidavits, taking facts affirmatively alleged by plaintiff as true and construing disputed facts in the light most hospitable to plaintiff."). In setting forth the prima facie case, the plaintiff is required to bring to light credible evidence and "cannot rest upon mere averments, but must adduce competent evidence of specific facts." Barrett, 239 F.3d at 26 (citing Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 145 (1st Cir. 1995)).

III. Personal Jurisdiction

The Due Process Clause of the Fourteenth Amendment requires that an out-of-state defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The District Court may exercise two types of personal jurisdiction over defendants: general and specific jurisdiction. Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 9 (1st Cir. 2009). General jurisdiction broadly subjects the defendant to suit in the forum on all matters, including those unrelated to the defendant's contacts with the forum. Bluetarp Fin., Inc. v. Matrix Constr. Co., 709 F.3d 72, 79 (1st Cir. 2013); Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 31 (1st Cir. 2010). Specific jurisdiction, by contrast, depends on "an affiliatio[n] between the forum and the underlying controversy." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011). For a federal court sitting in diversity to exercise specific jurisdiction, Rhode Island's long-arm statute, R.I. Gen. Laws § 9-5-33(a), must authorize it.

Bluetarp Fin., Inc., 709 F.3d at 79; Astro-Med, Inc., 591 F.3d at 8. The Rhode Island long-arm statute is coextensive with the permissible reach of the Due Process Clause. Id.

Plaintiffs contend that Cincinnati's business presence in Rhode Island is sufficient for the exercise of general jurisdiction and that the Rhode Island nexus with the claim is adequate for specific jurisdiction.

A. General Jurisdiction

For a company, the paradigm forum for general jurisdiction is the place where it is "fairly regarded as at home." Goodyear Dunlop, 131 S. Ct. at 2853-2854. Since general jurisdiction subjects a defendant to suits involving any claim against it, the standard for establishing general jurisdiction is considerably more stringent than for specific jurisdiction. Cossaboon, 600 F.3d at 32. To make the determination whether a plaintiff has sustained its burden of establishing general jurisdiction, the First Circuit has articulated a three-prong test: (1) the defendant must have sufficient contacts with the forum state; (2) those contacts must be purposeful; and (3) the exercise of jurisdiction must be reasonable under the circumstances. Id.

Analysis of the first two prongs is not mechanical or quantitative but depends on the quality and nature of the defendant's activity in the forum; although the inquiry is highly individualized and fact-specific, it is guided by the quantum of contacts deemed sufficient in other cases. Id. at pp. 32-33. The sufficiency of the contacts, the first prong, requires an examination of whether the defendant is engaged in the continuous and systematic pursuit of "extensive and pervasive" general business activities in the forum state. See e.g., Cossaboon, 600 F.3d at 32; Barry, 909 F. Supp. at 75. The second – the purposefulness of the contacts – requires an affirmative demonstration that the defendant purposefully and voluntarily directs its activities toward the forum to avail itself of the

privilege of conducting activities within the forum, thereby invoking the benefits and protections of the state's laws. Cossaboon, 600 F.3d at 32. In examining whether contacts support general jurisdiction, the court may consider those prior to the filing of the lawsuit, including those that occurred after the cause of action arose but before the suit was filed.[3] Id. at p. 29; Harlow v. Children's Hosp., 432 F.3d 50, 64-65 (1st Cir. 2005). The third prong examines whether the exercise of general jurisdiction is reasonable. Cossaboon, 600 F.3d at 33. The reasonableness inquiry is "secondary rather than primary," and a court does not address it unless the plaintiff has cleared the first and second prongs. Id.; Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465 (1st Cir. 1990).

Here, Plaintiffs argue that this Court has general jurisdiction over Cincinnati because it has obtained a license to do business in Rhode Island, has appointed an agent for service of process in Rhode Island, and has received premiums from Rhode Island policies. (Document No. 15 at pp. 12-13). While those facts are undisputed, it is also undisputed that Cincinnati has no physical presence in Rhode Island and uncontroverted that the premiums received from Rhode Island business represent only a tiny fraction of Cincinnati's total revenues.

These contacts are not constitutionally sufficient to establish general jurisdiction and subject Cincinnati to suit in this District on all matters. Plaintiffs have not shown that Cincinnati has the degree of continuous, significant and purposeful contacts to satisfy the requirements of due process. Since it was licensed to sell insurance in Rhode Island in 2008, Cincinnati has not done business here continuously and, in the majority of the years in question, the total premium dollars collected has been less than $4,000.00 annually and thus de minimis. See Harrington v. C.H. Nickerson &

[3] This approach stems from the basic distinction between general and specific jurisdiction. Unlike specific jurisdiction, which focuses on the cause of action, the defendant and the forum, general jurisdiction is dispute blind with the sole focus on whether the defendant is "fairly regarded as at home" in the forum. Goodyear Dunlop, 131 S. Ct. at 2853-2854; Harlow, 432 F.3d at 65.

Co., Inc., C.A. No. 10-104-MC, 2010 WL 3385034 at *5 (D.R.I. Aug. 25, 2010) (holding, in part, that revenues representing only 1.4% of total were "too limited in financial significance to establish general jurisdiction in Rhode Island"). In addition, Cincinnati's license to transact insurance business in Rhode Island and its designation of Rhode Island's Superintendent of Insurance as its agent to accept service of process do not tip the balance in favor of asserting general jurisdiction. There is nothing in the applicable Rhode Island statutes that could be construed as a consent or submission to personal jurisdiction in Rhode Island. See Harrington, 2010 WL 3385034, at *4. Furthermore, it has been held that the mere designation of an agent for service of process cannot alone establish general jurisdiction over a foreign corporation. See, e.g., Worldcare Limited Corp. v. World Ins. Co., 767 F. Supp. 2d 341, 354-358 (D. Conn. 2011).[4]

B. Specific Jurisdiction

Specific jurisdiction examines: (1) whether the claims arise out of or are related to the defendant's in-state activities ("relatedness"); (2) whether the defendant has purposefully availed itself of the benefits and protections of the forum state's laws ("purposeful availment"); and (3) whether the exercise of jurisdiction is reasonable under the circumstances (the "Gestalt factors"). Bluetarp Fin., Inc., 709 F.3d at 83; Sawtelle v. Farrell, 70 F.3d 1381, 1388-1389 (1st Cir. 1995). The plaintiff has the burden on relatedness and purposeful availment while the defendant must show jurisdiction is unreasonable. See Ticketmaster, 26 F.3d at 206. The inquiry ends if the plaintiff fails to establish relatedness or purposeful availment. See Phillips Exeter Acad. v. Howard Phillips Fund,

[4] Plaintiffs rely heavily on First Nat'l Equip. Fin v. Cameron Ins. Cos., No. 8:10CV370, 2011 WL 474362 at **5-7 (D. Neb. Feb. 3, 2011). However, that case is distinguishable because the Nebraska statute in issue for foreign insurers (Neb. Rev. St. § 44-135) explicitly addressed the issue of personal jurisdiction, the plaintiff seeking coverage was located in the forum state and the insurer had negotiated with the plaintiff in the forum state about providing a defense to the underlying personal injury litigation.

Inc., 196 F.3d 284, 288 (1st Cir. 1999).[5] Ultimately, the Court must find for the plaintiff on all three prongs. Bluetarp Fin., Inc., 709 F.3d at 80. Specific jurisdiction is evaluated claim-by-claim. Astro-Med, Inc., 591 F.3d at 9. A court may exercise specific jurisdiction over a defendant on one claim while declining to exercise personal jurisdiction on others in the same complaint. See id.

To support its claim of specific jurisdiction over Cincinnati, Plaintiffs point out that the incident underlying this declaratory judgment action occurred in Rhode Island, one of the purported additional insureds, Electric Boat, is located in Rhode Island, and Cincinnati wrote and issued a policy that covers acts and omissions relating to the incident. (Document No. 15 at p. 14). While it is true that the incident occurred in Rhode Island, this coverage dispute is not directly about the incident. Rather, it centers on an interpretation of the insurance contract between Cincinnati and International Door and whether or not PDS and Electric Boat have coverage as additional insureds under that contract. In particular, the dispute involves the application of the Employer's Liability Exclusion to Additional Insureds. As discussed more fully below, Plaintiffs have not brought forth any facts or circumstances that would support a finding that this case is related to Cincinnati's limited contacts with this District or that it was reasonably foreseeable to Cincinnati that its actions might require it to defend itself in a coverage dispute in this District.

(a). Relatedness

To satisfy the relatedness prong, one or more of the elements of the cause of action must arise from or relate to the defendant's contacts with the forum state. Bluetarp Fin., Inc., 709 F.3d at 80. Relatedness focuses on the nexus between a plaintiff's claim and the defendant's contacts with the forum. See Sawtelle, 70 F.3d at 1389. It is a flexible, relaxed standard, as evidenced by

[5] Because I find that Plaintiffs clearly fail to meet their burden as to both relatedness and purposeful availment, the Court need not specifically address the Gestalt reasonableness factors.

the disjunctive nature of the requirement that the contact "arise out of" or "relate to" the defendant's forum-state activities. Id. While flexible, relatedness still requires a material connection between the defendant's forum-state contacts and the plaintiff's cause of action. Negron-Torres v. Verizon Commc'n, 478 F.3d 19, 25 (1st Cir. 2007).

Here, Cincinnati has very limited contacts with this District, and none of them relate in any way to Plaintiffs' contract claim. Neither PDS nor Electric Boat were expressly named as additional insureds under the International Door policy, and there is no evidence that Cincinnati was aware prior to this coverage dispute of the Electric Boat project in issue or the contract between PDS and International Door for work to be performed in this District. See Andreyev v. Sealink, Inc., 143 F. Supp. 2d 192, 199 (D.P.R. 2001) (finding personal jurisdiction over foreign insurer where the policy made "abundantly clear" that it was insuring a vessel regularly operating within the jurisdictional reach of the forum district).

(b). Purposeful Availment

Plaintiffs' specific jurisdiction proof also fails on the purposeful availment prong, which requires evidence of "a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's presence before the state's courts foreseeable." Bluetarp Fin., Inc., 709 F.3d at 82 (quoting Hannon v. Beard, 524 F.3d 275, 284 (1st Cir. 2008)). Purposeful availment is a "rough quid pro quo," that is, "when a defendant deliberately targets its behavior toward the society or economy of a particular forum, the forum should have the power to subject the defendant to judgment regarding that behavior." Id. (quoting Carreras v. PMG Collins, LLC, 660 F.3d 549, 555 (1st Cir. 2011)). Its cornerstones are voluntariness and foreseeability. Id. To sustain its burden, a plaintiff must show

(1) that it felt the injurious effects of a defendant's tortious act in the forum; and (2) that the defendant's intentional conduct was "calculated to cause injury" to the plaintiff there. Noonan v. Winston Co., 135 F.3d 85, 90 (1st Cir. 1998) (quoting Calder, 465 U.S. at 791). A defendant's interactions with a state are not voluntary just because a defendant has a relationship with the plaintiff who happens to reside there. Phillips Exeter Acad., 196 F.3d at 292.

Although Cincinnati issued a general liability policy to International Door, there is no evidence that Cincinnati purposefully availed itself of the privilege of conducting business activities in this District in doing so. Cincinnati issued the policy in question to a Michigan entity, and there is no evidence that Cincinnati was aware that it was specifically insuring work to be performed in this District. See Hunt v. Auto-Owners Ins. Co., No. 2:15-cv-00520-JCM-NJK, 2015 U.S. Dist. LEXIS 75099 at **9-10 (D. Nev. June 10, 2015) ("The fact that the accident occurred in [the forum state] is insufficient to warrant th[e] Court's personal jurisdiction over defendants, as the location of the accident does not reflect any purposeful availment on the part of [the insurers]"). There is no evidence of any conduct on Cincinnati's part that would make it reasonably foreseeable for Cincinnati to anticipate being sued in Rhode Island on a claim related to the interpretation of the policy.

IV. Venue

Pursuant to 28 U.S.C. § 1391(b), venue is proper only in a judicial district in which Cincinnati resides, where a substantial part of the events or omissions giving rise to the claim occurred or where Cincinnati is subject to personal jurisdiction with respect to such action. Without either general or specific personal jurisdiction over Cincinnati, the District of Rhode Island is an improper venue. See Morel ex rel. Moorehead v. Estate of Davidson, 148 F. Supp. 2d 161, 168

(D.R.I. 2001) (citing 28 U.S.C. § 1406(a)). Under circumstances where this Court lacks personal jurisdiction and venue over the only defendant, "it may, in the interests of justice, transfer the case under [28 U.S.C. § 1361] or [28 U.S.C. § 1406(a)] to a court in which venue and jurisdiction would be proper." See Sullivan v. Tagliabue, 785 F. Supp. 1076, 1082-1083 (D.R.I. 1992).

This insurance coverage dispute centers on the interpretation of a policy issued by Cincinnati, an Ohio corporation, to International Door, a Michigan entity. The policy contains several Michigan-specific provisions. (See Document No. 1-3). Cincinnati contends that it would be most effective for this Michigan insurance policy to be interpreted in Michigan. Thus, it consents to transfer of this action to the Eastern District of Michigan pursuant to 28 U.S.C. §§ 1404(a) and 1406(a). In their Memorandum in Opposition, Plaintiffs do not specifically address Cincinnati's alternative request for transfer and thus the request is effectively unopposed. In addition, due to the lack of personal jurisdiction and proper venue in this District and the totality of the circumstances, I conclude that the interests of justice would be better served by transfer of this action to the Eastern District of Michigan than by dismissal under Rules 12(b)(2) and (3) and I so recommend.

V. Conclusion

For the foregoing reasons, I recommend that Defendant Cincinnati's Motion (Document No. 7) be GRANTED in part solely as to its alternate argument for transfer of this case to the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by

the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
March 3, 2017